CHAPTER-IX

CONCLUSIONS AND SUGGESTIONS
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9.1. Introduction

The current system of deterring corporate crime and violence is weak and ineffective. Management that tolerates, permits, and even fosters a criminal culture is largely beyond the reach of the law because managers, executives and officers cannot be personally convicted absent evidence beyond a reasonable doubt that they acted with mens rea. This has imposed costly externalities upon our economy in the form of excess crimes and has harmed the social order, in general and in particular, the investor confidence, leading to an unnecessarily high cost of capital. Management should finally be held responsible for failing to insist upon lawful conduct.

The common law experience with corporate criminal liability can and should influence the introduction of the concept of corporate criminal liability in the Indian legal system. European civil law countries like Denmark and France have adopted the common law model of identification doctrine as a ground theory for the ascription of criminal liability to corporate bodies. Nonetheless, it is important to look at the whole picture of corporate criminal liability. There has to be an analytical view of the common law experience and not merely an adaptation of the traditional theories. The success of the introduction of a completely new concept in the U.S legal scenario is conditioned to the existence of a solid theoretical background. It is in the hands of U.S. legal scholars to develop theoretical constructions that will
support the attribution of criminal liability to corporate bodies and trigger structural and legislative changes in the legal system.

9.2 Testing of Hypothesis

The findings of the research study support the hypothesis initially formulated. The initial hypotheses were:

1. The first hypothesis is “according to Corporate Law, the Body Corporate is a legal fiction and it can never be subjective of imprisonment under Criminal Law whereas the person who committed offence is liable to be prosecuted and punished under Criminal Law”.

Basing on Chapter-II, III and VI, it is understood that a corporate body is a legal fiction and cannot imprisoned. However, it is also found that the Supreme Court of India in many cases was inclined to take the help of criminal law while giving dynamic and liberal interpretation to corporate criminal law. So, the first hypothesis is accepted subject to a rider, and the corrected hypothesis would be in these words:

"According to Corporate Law, the Body Corporate is a legal fiction and it can never be subjective of imprisonment under Criminal Law whereas the person who committed offence under the guise of body corporate is liable to be prosecuted and punished under Criminal Law and the Supreme Court of India is gradually moving from static and literal interpretation to dynamic and liberal interpretation, by superseding the common law theories of mens rea and actus reus."

2. The Second hypothesis is "the existing legislations and enforcement mechanisms are deficient in curbing corporate crimes and frauds effectively".

Basing the elaborate discussion made in the Chapter-VI, the existing legislations and dispute settlement mechanisms are absolute flawed in many respects, ostensibly democratic governments are usually unable to ignore the existence of society, its values, and its members. A wide range of interests compose the criminal justice system, which forces it to reflect more than the decisions of buyers and sellers. Thus, the criminal justice system is animated by the social meanings embedded in the institutions that underlie it. Therefore, The Second hypothesis proved to be correct.

3. The Third hypothesis is that "an effective international code should be made in place for dealing with corporate crimes of cross border nature".

Chapter-VII and VIII closely observed that there is no specific code is provided by International Organisations like U.N.O., or W.T.O. to regulate the crimes committed by the body corporate, especially in the international sphere. Though the various countries made independent legislations for curbing the corporate crimes within their territorial jurisdiction, but beyond their jurisdictions are not yet be regulated, except the OECD guidelines\(^2\). Therefore, the third hypothesis is also proved to be correct.

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9.3 Conclusions of the study

The implication of this thesis's findings about the function of corporate criminal liability are both simple and problematic. They are simple because the conclusion that the law of corporate criminal liability should be much more narrowly tailored to the fact of institutional responsibility - in order to maximize desired effects and reduce unwanted ones - follows without much further effort. The implications are problematic because, as prior evaluations of the law of corporate criminal liability explicitly or implicitly demonstrate, there is no first-best rule of genuine institutional fault.

Relying on the criminal law to prevent corporate crimes is more complicated and less effective than legislators, regulators, and enforcers believe. The most effective use of criminal law in deterring corporate crime requires legislators to amend the substantive laws so they provide clear notice of prohibited conduct, to avoid the reflexive impulse to increase penalties, and to review enforcement policies. The likelihood of effectively deterring crime at corporate entities is greatest when the substantive law, penalties, and enforcement policies take into account the institutional setting in which corporate crime occurs.

This thesis set out to achieve coherence and integrity in the way in which courts in the United Kingdom impute acts and intents (or causal relationships) to corporations for the purpose of imposing criminal liability on them. The idea that was tested was that the use of an appropriate mechanism of imputation is a viable prospect for this to happen. This followed from the contention that the ambiguity of the concept of corporation and the unsuitability of criminal law rules to deal with such singularity are the major causes of the incoherence of courts' decisions and lack of integrity of corporate criminal liability. The more specific conclusions are drawn from this study are as follows:

9.3.1. Inadequacy of Respondeat Superior

By this thesis's lights, respondeat superior is grossly overbroad since it has almost nothing to do with the social practice of institutional blame. The claim here has been that the legal process and the social practice of faulting the institution together produce the criminal sanction, in the form of reputational impact. The legal rule is not an afterthought. Logically, the more tightly the rule is fastened to institutional blameworthiness, the more that the practice of corporate criminal liability will retain its justification, its bite, and its utility as a means of education. The rule functions as an input to that particular form of institutional blame that expresses itself through the courts.

A rule deeming virtually all crimes committed by corporate agents in corporate settings to be corporate crimes is easy to apply but plainly does not fit with any persuasive account of the relationship between corporate effects and individual conduct. Much of the uncertainty about corporate liability's
place in criminal law may result from mixed messages. On one hand, the law says corporate are virtually always answerable for their agents' crimes, almost without regard to the facts. On the other hand, the social practice of evaluating a firm's real responsibility has exerted a continual pressure on the criminal practice that has pushed enforcers to select corporate criminal cases on more discriminating grounds.

Prior accounts of corporate criminal liability often appear to evaluate the purpose of corporate *criminal* liability on the assumption that it has to be based in ordinary agency liability. The *effects* of corporate criminal liability might look different, and therefore require different evaluation, under a system that genuinely assessed firms' roles in their agents' criminal conduct. At a minimum, a responsibility-based system of law would clarify, and strengthen, any messages that result from imposing criminal liability on firms.

Feedback effects are likely. A tighter, better-justified doctrine of corporate criminal liability is apt to begin settling theoretical controversy, then policy controversy, over the practice of imposing criminal liability on firms. Eliminating confusion about why particular firms deserve criminal liability and about why the criminal law includes enterprise liability will make impositions of corporate criminal liability clearer and more influential in their reputational effects. The doctrine would enjoy both greater support and greater influence.

9.3.2. Unavailability of a First-Best Rule

Unfortunately, under existing technologies of responsibility assessment, there is no optimal means of assessing firm fault. We do not have
the slightest concept of how one could judge a firm to have committed a crime in the absence of an agent crime. Some form of vicarious liability is unavoidable. Efforts to overlay forms of firm personhood on top of agency liability have been unsuccessful. Anthropomorphisms and metaphors mistake personhood (rather than responsibility) as a precondition to legal fault. They are a reactive artifact of the traditional criticisms of corporate criminal liability that maintained that criminal law's principle of mens rea does not fit firms.

More to the point, personhood concepts do not work. For example, one proposal says corporations should be criminally sanctioned when their "ethos," that is, a "corporation's characteristic spirit or prevalent tone of sentiment," encouraged agents to commit the crime. Another says that actus reus should be found by considering "whether given the size, complexity, formality, functionality, decision making process, and structure of the corporate organization, the agents' acts are fairly said to be the actions of the corporation"; and that mens rea should be found by considering "whether the corporation purposely, knowingly, recklessly, or negligently engaged in the illegal act," that is, "whether the average body corporate of like size, complexity, functionality, and structure, given the circumstances presented, would have the required state of mind". It is extremely difficult to see what trial and appellate review of enterprise cases would look like under such legal rules.
9.3.3 Understand common law experience based on the Indian legal system

The contemporary concept of corporate criminal liability was created and developed by common law courts and this issue has also been the object of study of many common law scholars. Thus, the common law experience with corporate criminal liability can serve as a pragmatic and theoretical source for the work of Indian scholars and legislators. Indeed, common law theories of corporate criminal liability have already been adopted in France, Denmark and other civil law jurisdictions.

9.3.4 Need for a critical approach the common law experience.

It does not seem that the Indian legal system will accept corporate criminal liability in the near future. Discussions about this theme are in its infancy in India, but a change is inevitable. The increasing control over corporations in developed countries has made corporations changed their targets and this has transformed undeveloped and developing corrupt countries like India in a free territory for this type of criminals. But, a contra sense of that is that corporate criminality is becoming a concrete reality in U.S, Brazil and the Indian law will have to react to that. Because of the European influence, and in this case especially because of the French influence, it seems that India will likely follow the French example by adopting the identification theory.

This would be quite problematic. The traditional theories of corporate criminal liability have shown to be ineffective. The prevailing theory, the identification doctrine, is problematic and rooted in individualistic ideas. It
has a simple palliative effect at most. The search for the guilty mind is in the majority of the situations unfruitful and in the end no liability is attributed to the corporation. In addition to that, the identification theory does not incorporate a holistic view of the corporate entity, which better explains the reality of corporations and corporate misconduct. It is important that the Indian legislator be aware of the limitations of the traditional law theories and be acquainted with what has been proposed as a solution and alternative to these limitations in order to avoid taking a problematic and flawed position.

9.3.5 Introduction and development of the concept of corporate criminal liability in India.

Corporate criminal liability will only be effective in India when incorporated in the Statutes, especially the Indian Constitution and the Criminal Code. But, no legislative change will occur without an exhaustive doctrinaire debate. Relevant statutory amendments are the concretization of what had been already analysed and constructed by legal scholars. In India the growth of the concept of corporate criminal liability is conditioned to the maturation of the idea in doctrinal debates.

Indian scholars must trigger these changes by developing theories and models and more importantly, by bringing into discussion all aspects related to corporate criminal liability; this implies debates that range from conceptual to practical concerns. It is important that legal scholars address basic questions such as the concept of corporate crime and the need to use criminal law to control corporate crime. Parallel to that, there has to be a structural change in the legal system to receive the concept of corporate criminal
liability. Legal scholars can contribute to that by remodelling the traditional theory of crime and introducing new aspects of the corporation as a real and complex person able to have mens rea, to be a moral agent and consequently to be criminally liable for its acts.

9.3.5.1 Definition of corporate crime

The expression corporate crime is not common in India. It is important that the scholars use this expression and that it be differentiated from “white collar crimes” that are not only related to the individual action but also have a purely economic connotation, and exclude other violent crimes.

9.3.5.2 Redefining the role of criminal law in the Indian legal system

Once the concept of corporate crime is introduced in the legal system, the viability of using criminal law to control corporate crime will be questioned. It is important that this issue be integrated in the current discussions about the general role of criminal law.

9.3.5.3 Extending the concept of persons in the Indian legal system

The concept of persons should be modified in order to include a broader definition of legal person so as to understand corporations as real and complex entities. Thinking about corporate criminal liability in India has been afflicted by an oversimplified view of corporations. Currently, the fiction theory prevails in both the civil and criminal law fields. The fiction theory denies the possibility of attributing corporate criminal liability to
corporations. In addition to that, it would be essential to import the idea that organizations are complex organisms not identifiable with an individual member.

Organizational theories, especially the idea of body corporate as a metaphor would serve as theoretical basis for this broader definition. Organizational studies have shown that corporate bodies are not merely an aggregation of individuals as portrayed by current theories of corporate criminal liability. A new corporate image must be incorporated into criminal law. This can only be achieved if legal scholars cross the border between law and organizational studies and face the reality of corporations more closely, however complex and disturbing that may be, or sometimes at odds with their personal preconceptions and biases.

9.3.5.4 Adaptation of criminal law theory

There is no need to change the prevailing definitions of act or mental element, since they can be applied to corporations. But they need to be interpreted extensively as to include the corporation's peculiar way of acting and of having mens rea. For the allocation of the mental state, it is vital that the concept of corporate culture also be introduced in the criminal law theory as a different place to find intention. Another aspect of criminal liability that has to be reshaped is the issue of moral agency. A more comprehensive theory of crime has to embrace the notion that corporations are also moral agents.
Even a strong requirement of proof of an agent's intent to benefit the corporation would leave many existing cases of corporate criminal liability unaffected. More often than not, the offender in the firm setting who pursues criminal means does so to reap advantage for both herself and the firm. At least some of these cases will not really be about how institutional conditions spawned criminality. No matter what legal standard is pursued for corporate criminal liability, the lack of a first-best rule will leave a gap between the scope of liability and the objective to communicate about group wrongdoing.

Enforcers should confront such a gap by selecting cases in which the imposition of corporate criminal liability will address institutional production of crime. On this Article's account, those will be the cases in which reputation is at stake. Prosecutorial guidelines ought to counsel the selection of cases that will convey the message that a serious institutional lapse that produces crime is deviant. Prosecutors should consider whether a corporate criminal prosecution will impose a reputational sanction that is roughly commensurate with the seriousness of the wrongdoing and the corporate's role in producing the harm.

Reputational sanction is not an end. It is an indicator of social meaning and assists in the educative function of criminal law. Reputational sanction is also the bite in criminal corporate liability that causes credible enforcement threats to encourage firms to disclose and rectify wrongdoing by their agents. If corporate criminal liability did not impose a unique sanction, and certainly if enforcers never actually inflicted that sanction, firms would operate under
much less powerful incentives to control individual behavior. Thus, achieving instrumental benefits of corporate criminal liability and tailoring its scope to firms' true blameworthiness go hand in hand.

Responsibility-based enforcement practices would be liable to eliminate many cases, since over ninety percent of corporate criminal cases have involved privately or closely held firms, many of which likely experience little reputational effects. The fewer prosecutions and the more socially important the defendants in those cases, the more meaning an institutional conviction will carry and the more reputational sting it will inflict. The more meaningful and punitive the institutional conviction grows, the more prosecutors will tend to reserve it for the most important cases.

With corporate liability, criminal enforcement is highly normative by itself, not just because of legal sanctions that may follow. This is not a novel insight. We have long spoken about how an indictment or conviction makes a statement, inflicting reputational or psychological harm or expressing values. But we have under-explored the mechanism of this production. As a consequence, we do not have a good understanding of how to trigger what we could call "enforcement sanctions," to control them, or to measure or interpret their effects.

Corporate criminal liability is a case in point because when we strip it down to its justifiable purpose, we are left with a law that is influential far more by its invocation than through the sanctions it authorizes. There are other cases in which enforcement alone sanctions, and further such problems
for analysis. People have reputations too, and the criminal law's public cases are by no means limited to corporate prosecutions.

Sometimes not only do indictment, trial or plea, and conviction impose distinct costs, but those costs can surpass those of statutory sanctions. Undeniably, enforcers often act in such contexts because enforcement has sanctioning effects. Such motives can pose problems, but cabined within the right conception of the enforcer's mandate they can produce expressive benefits.

Reputation is not enforcement's only capital. Consider, for example, areas where levels of compliance are opaque, such as falsehood or fraud in the legal process or the financial markets. Enforcement in such contexts may signal to others who are inclined to comply, even if only weakly, for normative reasons or for benefits of reciprocity, that the state is serious about deterring free riding, and thereby discourage defection.

We might ask whether the effect of such enforcement signaling is decoupled from the actual performance of deterrence among putative free riders, thus explaining the state's sometimes overblown expressions of devotion to deterrence. In other words, enforcement might be a powerful heuristic.

9.4 The Contribution of this Study

This thesis proposes an approach to harmonise the imputation of acts and intents (or causal relationships) to corporate bodies by criminal law courts. Such harmonisation requires establishing common ways of
interpreting rules of statutes and precedent through a mechanism designed to collate the relevant rules. The mechanism comprises a number of rules that directs courts to aggregate the acts, omissions, intents and knowledge of all agents involved in a relevant transaction and determining whether the aggregate is consistent with the collective rationality that governed the decision-making process in the corporation prior to the performance of the actus reus of the offence charged.

It is submitted that if courts seek direction from this mechanism when enforcing criminal laws against corporate bodies and their decisions will be fairly coherent and predictable.

In the process of explaining this approach a number of propositions were offered. Given the current uncertainty as regards what criminal law courts mean when they talk of a 'corporate,' this term was defined as any changeable entity (existing in the legal world) that is recognised either by the legislator or the court as a corporation because of its independence of thought and action and ability to relate to the consequences of such thought and action. The independence of thought and action and ability to relate to their consequences justify the ascription of responsibility and the imposition of punishments on body corporate whether for deontological or teleological purposes. However, since criminal responsibility and punishability do not presuppose amenability to the criminal law it was noted that the rules of the criminal law ought to be adaptable to deal with the peculiarity of the corporate defender. It was therefore submitted that a corporation's liability ought to be either direct (non-derivative) where its agents are 'innocent' or its liability ought to be accessorial (derivative) where one or many of its agents are shown

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to be guilty. This may resolve the quandary created by the facts that where the offence requires proof of intent, criminal law courts compel corporations to substitute for guilty senior managers (a restrictive form of vicarious liability); where the offence is a strict or absolute liability offence, criminal law courts hold corporations liable for the act of any agent; and where the body corporate was the targeted victim of the agent's fraud, some criminal law courts have declined to impute the fraud to the body corporate in spite of the agent's station.

Hence, coherence and integrity may be achieved if the imputation of acts and intents to body corporate and the use of criminal law rules are guided by the truth of the corporate nature.

9.5 Suggestions

In the light of the above research study the following suggestions are offered for mitigating the harm and loss caused by the corporate bodies to some extent.

9.5.1 Voluntary corporate code of conduct

Many critics of corporate globalisation favour a return to stronger national regulation, a perspective that mirrors the protectionist backlash. Pro-business voices, on the other hand, insist that the globe must be the playing field, but that formal global rules would ruin the "new economy," which needs at most loose voluntary codes. Though voluntary codes are obviously weak and unevenly adopted, advocates of more robust global regulation must find an institutional basis for binding regimes. In the absence of a sovereign
authority, what institutions can adopt and enforce binding rules at the global level? Unfortunately, voluntary corporate codes of conduct have many weaknesses—so many that it is difficult to point to a single case that is an unqualified success.

These codes are often vague statements of principle that cannot provide reliable guidelines for behaviour in concrete situations. They do not generally include complaint procedures, nor any basis for legal claims or redress, and thus provide little scope for individuals to be compensated for corporate violations that cause harm. Corporations do not adopt codes unless faced with public pressure and negative publicity. This means that codes are adopted by only a few sectors that are especially vulnerable to consumer pressure and boycotts. Corporations adopting codes are likely to consider themselves to be at a competitive disadvantage if they actually put the code into practice.

Enforceability and transparency are often addressed through the use of third parties that monitor a corporation's adherence to the standards. Sometimes, this is done by large public accounting firms. A corporation whose code of conduct is subject to audit is often given a report that it does not have to make public. The large majority of codes remain weak, untransparent and unenforceable, simply because these are the types of codes with which the corporations are most happy and which meet their public relations goals. Binding legal regulations demand adherence, and have behind them the obligation deriving from a public authority.

Of course, no sovereign State-like power exists at the global level that can adopt and enforce global regulations. But we are in a period of transition.
In recent years, Governments have negotiated an increasing number of binding agreements at the international level and have devised more or less effective means to enforce them.

9.5.2 Ethical consumerism ... or is it?

Ideally Governments should hold corporations accountable through "strong internal regulations backed by strong international law and enforcement institutions". However, transnationalisation of investment has not been matched by transnational regulation. Globalisation has also weakened regulation at the national level. Many countries have set up special investment zones that are not only tax free but also free of virtually all regulations. A coalition of several influential NGOs are calling for international codes requiring that transnational corporations disclose information about the environmental and human impact of their work. The proposal is based on the US Toxic Release Inventory which requires companies to disclose annual emissions of toxic chemicals. Corporations should be held responsible for legal wrongs. But as long as consumers continue to demand ever-cheaper goods and services, businessmen will find ways to deliver. Much of the success or failure of a corporate social responsibility movement depends on ethical consumerism.

9.5.3 Growing need of Trans-border cooperation

Court cases and related legal efforts usually spring from particularly outrageous acts of corporate malfeasance such as the Bhopal disaster, Shell's actions in Nigeria and Unocal's Burma oil pipeline. Plaintiffs seek redress, and their legal teams usually seek to expand and strengthen the capacity of
law at the international level to impose liability on corporations for actions that do harm the environment, human health and basic rights. Such initiatives typically rely on an inventive combination of national and international law, but they frequently contribute to emerging international legal norms and standards. Establishing legal standing across national borders is one of the biggest barriers to such actions.

Intergovernmental action could help promote this expansion of law in a variety of ways—for instance, by developing an International treaty of legal cooperation which would allow prosecutors or judges in one national jurisdiction to call on the judiciary in another national jurisdiction for help with evidence, including the questioning of suspects and witnesses, which is a growing need in all trans border cases.

9.5.4 Global Policy Instruments

Global taxes, fees and fines are policy instruments that could shape corporate action to promote more sound development. Taxes or other levies use market pricing, rather than regulatory rules, to press companies to adopt more socially responsible policies, for example, they can create a disincentive for financial speculation or they can create a disincentive for the use of carbon-based fuels or the production of products dependent on carbon-based fuels (Carbon tax). The revenues raised by these instruments could be used to fund global agencies such as the UN, and they could be used to correct existing problems—to clean up environmental disasters. Levies might be based on national legislation and harmonised internationally through a treaty or other accord.
This, however, implies erosion of the States' sovereign taxing powers, still a sensitive area. Unfortunately, the United States has been staunchly opposed to international taxes and has blocked progress in this field during the past decade. Progress remains possible, however, and a vigorous international campaign led by the France-based international non-governmental organisation has given the idea growing momentum.

9.5.5. There are no quick fixes - It is long and arduous process

Combating corporate crime is a long and arduous process. There may be areas in which quick wins can be gained - such as streamlining procedures in administration, opening up public procurement to make it more transparent, prosecuting a large number of corrupt officials or frying a few “big fish” – but there is no over-all “quick fix”.

9.5.6. Continuous scrutiny is required

Experience shows that, for example, in corporate crimes, it is not enough to terminate bad apples. Unless processes are established for continuous monitoring, sooner or later a force will subside once more into a morass of corporate crimes and require yet another extraordinary effort to try to rehabilitate it. It is not enough to remove officials without also removing opportunities and ensuring that honest officers are being appointed to positions of trust. “Integrity testing” can help ensure that honest executives are identified and considered for promotion.
9.5.7. Focus on the system not simply on bad apples

To win public cooperation, a reform programme should focus on getting “the system” right rather than simply taking individuals out. In a situation of systemic corporate crimes, the negligent or corrupt officer is not a single “bad apple” and removing him or her will not save the barrel – the whole barrel needs to be addressed or else the person replacing the “bad apple” will be subjected to the same temptations. Prevention can be more effective and infinitely more economic than investigation and prosecution. At the end of the day, a government must have competent staff available and capable of discharging the affairs of state within a functioning institutional framework and subjected to an effective enforcement regime.

9.5.8. Escaping from the past – amnesty

Escaping from a corporate crime status quo is extremely difficult. Many powerful interests have reason to fear if a new dispensation is going to be unduly threatening to them. Amnesties are unpalatable, but may be unavoidable, at least in the context of small infractions by junior officials. Although the question of amnesties is problematic, there is much to be said for “letting sleeping dogs lie”. Some senior staff may need to be removed or disciplined but more junior staff, other than those who have been seriously abusing positions of trust, should not feel that they are at risk. Until workable solutions can be developed, the question of the past will remain one of the largest single stumbling blocks to any reform.
9.5.9. Leadership is vital but not enough - coalitions of interests can help

Without leadership from the top, any attempt to achieve major reforms in an environment of systemic corporate crimes will be bound to fail. Personal leadership is vital, and a leader must be seen to be “walking the talk”, and not just mouthing platitudes. However, just as laws alone will not suffice to achieve reform where corporate crimes are systemic, so, too, is leadership not enough. Coalitions can be created to support leadership, but there is a danger where they embrace interests whose pasts are not “pure”. Yet if only “saints” are admitted to a coalition there will probably be far too few. What is important is that coalition partners commit themselves to building a new future and, having made that commitment, that they be held to it.

9.5.10. Civil society has been overlooked

There appears to be a correlation between high levels of corporate crimes and low levels of civil society activity. Efforts to assist the emergence of a creative and vibrant civil society call for the development of both a legal framework within which civil society can establish its institutions free of government interference and control, and for the building of a positive dialogue between civil society and governments. This is not always easy to achieve, particularly in an emerging democracy, as it may cut across preconceived notions of how government decisions should be developed and imposed. One way of testing the genuineness of a government’s anti corporate crimes pledges is to see whether the government is prepared to work with civil society.
9.5.11. NGOs themselves can be sources of corporate crime

In a number of countries, NGOs have sprung up *ad hoc*, simply to tap into the assistance dollars which external donors have been prepared to provide to organisations for developmental efforts conducive to the strengthening of civil society. NGOs must be transparent and accountable in their own practices. NGOs, no less than official institutions, cannot be taken at face value and need to be monitored for transparency.

9.5.12. Legislators – when the watchdog becomes the thief

A serious flaw has emerged in a number of countries where the Legislature is not only a "watchdog" over official expenditure, but its Members are actively involved in spending public money (which they vote to themselves) and in letting public contracts (when they should be overseeing the process) and incorporating companies. The combination of "watchdog" role with that of the Executive gives rise to conflicts of interest and effectively poisons the body politics and corporate structures. It also breeds contempt for democratic institutions among the public at large. Unless these contradictions are resolved satisfactorily, (e.g. by effecting a clear separation of powers) it is doubtful whether effective reforms against corporate criminals can be achieved in those countries.

9.5.13. Political party funding remains a problem

The issue of political party funding has been largely ignored by the international community, perhaps because political parties in most industrialised countries thrive on illicit funding. Some argue that the best way
to restrict the influence of “money politics” is not so much to restrict money flowing in to a political party, but to restrict the amount of expenditures and what money can be spent on. The change of government has shown that an affluent political party with large investments and powerful cronies can none the less be voted out of office. This encourages the belief that the manipulation of political party funding need not necessarily be an insuperable barrier to changes of government.

9.5.14. Independent agencies without security can be toothless

The institutions of CBI, CVC, NIA, SFO, Ombudsman, Lokyutha and of CAG are attractive in theory but can only function effectively if their office holders are protected from arbitrary removal by the very Executive they are required to be watching and reporting on. Constituencies outside the political processes have to be built to defend these office-holders and where necessary make their voices heard.

9.5.15. Access to information

Some governments have recognised transparent access to information as the most effective tool for curbing corporate crimes and have enacted appropriate legislation. Government agencies can be required to post details of the services they provide and the official charges for them.

Indonesia is an example where local information displays with details of development projects Report have equipped the public with the information they need to keep a watchful eye on what is taking place.
9.5.16. Sound records management

Public access to information requires sound records management. So, too, does holding individual public servants to account. A government agency should be charged with overseeing corporate sector document handling processes by individual departments and making provision for the archiving of spent documentation.

9.5.17. The media and whistle blowing journalists

Most murders of journalists in recent years have been attributed to their investigating corporate cases and there is thus a need to render their work less risky as well as to raise standards of professionalism. Several institutions are running training courses in investigative journalism. However, in many parts of the world the media itself is blighted by corporate criminals. The media is an “integrity pillar” which requires serious attention.

9.5.18. Naming and shaming seems attractive but doesn’t seem to work

Efforts to “name and shame” in the Parliament drew a blank earlier when a committee report which “named names” had all the names censored, and some of those “named” threatened to sue newspapers who published details – even though the information was already in the public domain. In India, the Vigilance Commissioner resorted to the Internet to post the names of hundreds of officials suspected of corporate crimes. At best the jury is still out. Political leaders may have much thicker skins than do those who strategise to combat corporate crimes. In any event, extreme care is needed to
avoid any appearance of denying individuals a fair chance to defend themselves.

9.5.19. **Independent revenue authorities**

Independent revenue authorities can be established with closely monitored and well-paid staff, employed outside the public service salary structures. These authorities can boost the collection of revenue and enable a developing country to pay its officials and service the financial needs of its institutions more adequately.

9.5.19. **Do retirement benefits, especially for leaders, help?**

Logic suggests that a lack of security in retirement is a factor in the corporate crime equation. However, when it comes to those in the most senior positions the anecdotal evidence to the contrary is depressing. Controversial and excessively generous “retirement packages” were enacted for a large number of senior party figures. But it seems to have had no impact whatsoever on the level of “grand corporate crimes”. Perhaps because members of the extended families, rather than the leaders personally, have been the beneficiaries, there has been no willingness to end the looting.

9.5.20. **Definition of legal person**

Since legal persons can take a variety of forms, an effective scheme for imposing liability must cover a wide range of entities. The definition of a legal person should therefore include any entity having such status under the applicable national law, including criminal and company laws. More specifically, it should include corporations (whether or not they are listed on a
stock exchange), partnerships, societies, associations, foundations, and not for profit bodies.

9.5.21. Laws alone do the trick

Certainly, laws alone do not offer a quick route to curb corporate crimes, except perhaps where they are conferring on courts a jurisdiction they have not had before: to review the legality of administrative decisions taken by officials. Repeatedly, Legislatures have passed new anti-corporate crimes laws with great fanfare, and have regarded the job of reform (or at least the chimera of corporate crimes reform) as a job completed. But laws are failing in every country where corporate crimes are systemic, and they fail more from lack of enforcement than from any inadequacies in the laws themselves. There are also ways of achieving reforms, without changing the law, but using contracts and civil penalties to ensure that standards of conduct improve.

9.5.22. The Rule of Law is faltering

There is an inherent contradiction in trying to use a corrupt judicial system to uphold the Rule of Law. Institutional elements of the Judiciary, particularly appointment, removal and accountability aspects, have to be provided for. The Office of the Ombudsman may offer a way of introducing redress that can be quick and effective, and not be subject to the distortions that may hamstring a judiciary, but questions of judicial independence and judicial integrity have to be addressed from the outset.
9.5.23. Still needs to be better laws

There still need to be laws that are workable. The burden of proof which is placed on a prosecutor should not be unnecessarily demanding. Affording an accused a fair trial does not mean making it impossible for a prosecutor to prove the guilt of a corporate official. Laws of evidence need to be kept up-to-date, consideration given to introducing the specific offences on the basis of artificial persons. This is a key in Hong Kong in its successful battle against the corporate crimes initiative there.

Proving the requisite intention is not always an easy task since direct evidence (e.g. a confession) is often unavailable. Indeed, bribery and trading in influence offences can be difficult to detect and prove due to their covert nature, and because both parties to the transaction do not want the offence exposed. Therefore, the offender's mental state may have to be inferred from objective factual circumstances. For example, a supplier tenders a bid for a contract. Soon after, he provides an expensive trip abroad as a gift to the public official who will choose the winning bid. It may then be inferred that the supplier intended to influence the official's decision in the choice of the bid. It is vital that the rules of evidence in criminal procedural codes permit this form of proof.

9.5.24. Time limits for prosecutions need to be realistic

Corporate crimes, especially, can be slow to be revealed, and prosecution cases can take a long time to prepare thoroughly. For these reasons, time limitations for prosecutions to be brought, or for cases to be
concluded, need to be realistic. In some countries it is virtually impossible to
prosecute a case to its conclusion.

9.5.25. Monitoring the corporate officials

There is widespread belief that this is potentially an effective tool for
containing corporate crimes, but the case to date has only been made on
paper. Parliamentarians are remarkably shy when it comes to enacting laws to
provide for the monitoring of the activities of corporate officials. When laws
are enacted, declarations are seldom required to be made public. They are,
still less, routinely investigated for their accuracy. Initiatives in this area are
being followed closely.

9.5.26. The scope of immunities and privileges reviewed

In many countries corporate immunities and privileges are effectively
shield them from the Rule of Law. Indeed, in some countries, corporate
executives opt for elected office simply to gain immunity. These privileges and
immunities need to be reassessed and their scope minimised to practical
requirements. They are not granted to honour an individual, but to enable an
individual to discharge his or her duties effectively.

9.5.27. Corrupt Professionals should be blacklisted

Blacklisting firms caught bribing can be a potent weapon. Of course,
this requires that due process be observed, and that penalties be
proportionate. But there can be no doubt that the international corporations
blacklisted by Singapore in the 1990’s received a considerable shock, and that
in the future others will think twice before attempting to bribe Singaporean
officials. The World Bank subsequently went down the same path. It posts the names of blacklisted firms and individuals on its web site. This remedy works best in countries where the Rule of Law is functioning properly and adequate appeal mechanisms are in place to eradicate corporate crimes.

9.5.28. International problems require international solutions

American companies exporting into key emerging markets were shown to be about as corrupt as German exporters, operating without any such deterrent and with the added advantage of tax deductions for the bribes they paid. It would seem that unilateral action by a single government, even of the world’s most powerful nation, is insufficient to impact on a global problem. Rather the problem requires a coordinated international response. Hence, the needs for international accords, such as the OECD Convention against the Bribing of Foreign Public Officials in International Business Transactions are to be effectively implemented through international jurisdiction. The intentions of this Convention must be translated into reality.

9.5.29. International agreements require monitoring

It is not enough to sign a Convention. The Convention must be put into effect. Where a Convention strikes at a country’s successful export strategies, it is not altogether surprising that some exporting countries may be less than enthusiastic about the goals of the accord. On the other hand, those who support the aims of a Convention may regard some competitor countries with suspicion and need reassurance that they are not falling into a trap. Close evaluation and monitoring of implementation and enforcement, both by the
governments involved and by civil society and the private sector, becomes a *sine qua non*.

### 9.5.30. Supervision, control and due diligence

As mentioned earlier, the modern corporation is often extremely large and complex. Operations and decision-making are frequently diffuse, making it difficult for these entities to control every act of every employee. Nonetheless, it remains important that legal persons take preventive measures to supervise its employees and deter them from committing crimes. For these reasons, when assessing liability, many jurisdictions take into consideration whether a legal person has exercised due diligence in supervising and controlling its employees.

### 9.5.31. Surveys can measure and identify successes and failures

Reform programmes should be monitored for desired results. Monitoring requires effective measurement and is best done through surveys — and with the data being made public. Surveys can measure the impact of corporate crimes on business, public perceptions, and, by targeting selected service providers, measure the levels of corporate crimes in the services being provided.

The surveys can be international, national or local, but their practical utility increases the closer they get to the grass roots. By comparing the results from agencies in differing parts of the country, the least efficient, and perhaps most corrupt, can be identified and steps taken to redress their performance. International surveys help raise the issue on the national agenda and keep it at
the forefront of public debate. However, international surveys are comparative and fraught with statistical difficulties, and so are of limited usefulness. One of their most valuable aspects has been to raise the issue of corporate crimes on the national political agenda, and to highlight the need for national surveys which are now being undertaken with an increasing thoroughness.

9.6 Scope of further Research

There is still more work to be done than has been achieved so far. This thesis discusses the major points of a comprehensive approach to achieve coherence and integrity in the way courts impose criminal liability on corporate bodies.

Further research may therefore be carried out on the essence of the corporation within criminal law discourse analysing more cases and statutes than I have in this thesis.

The idea of invoking the doctrine of innocent agency (employee necessity or member-responsibility) in cases where the offence was caused by collective failure and to use secondary or accessorrial liability where one or many agents are guilty also requires further research. However, note must be taken of the fact that both innocent agency and (especially) accessorrial liability are complex and problematic and to use these as the bases for establishing a corporation's criminal liability may leave judges perplexed. Nonetheless, given that corporations always act through their agents, the mandatory use of mechanisms of imputation in defined circumstances may reduce such complexity. This is also what is proposed in this thesis as the solution to the lack of coherence and integrity. Thus, an appropriate Mechanism of
imputation (with a prescribed pattern as its primary rule) may be identified as a common thread linking the different decisions of different judges addressing different facts but involving corporate offenders.

A corporate principal may not be criminally liable for all the wrongs committed by its agents within the scope of the agency. Equally, the criminal law court may not be prepared to enforce principles such as *ex turpi causa non oritur actio*³ and *volenti non fit injuria*⁴.

The integrity of the criminal law is threatened by the inclination to circumvent the procedural rules in order to facilitate the prosecution and/or conviction of corporate bodies, it is important to ensure that the body corporate procedural rights are not simply disregarded. This thesis has undertaken to show how these rights may be recognised. However, there is need for further research into the implications of recognising these rights and how they may be enforced.

9.7 Final thoughts

The ultimate goal of curbing of corporate crime violence is to make corporate crime a "high risk" and "low return" undertaking. The priority should be to minimise the possibilities for corporate crime occurring in the first place, but in ways that do not impose unwarranted costs or needless restrictions that might obstruct people from doing their jobs effectively. The

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quest for integrity ought not to render government dysfunctional. In many places, courageous leaders are providing the vision and dedication necessary to channel public demands into organised action, calling out for open, accountable government. Praise and active support must be lent to those who struggle for open and honest government often against powerful and established corporate elites.

In seventeenth-century Mexico, one of that country's great poets, Sor Juana Ines de la Cruz, asked:

*Whose is the greater blame in a shared evil?*

*She who sins for pay, or he who pays for sin?*

The poet meant to expose the hypocrisy of men who scorned the moral character of the women with whom they sinned. I believe her words ring true even today, in a world where sinners often retreat into havens of wealth and power.

When Corporate leaders condone crimes and violence committed by them in other nations while condemning crime at home, they are guilty not only of crime and violence, but of the application of a double standard for the developed and developing worlds. The existence of this double standard is dangerous to all parties involved - to the rich nations who reserve ethics for the domestic stage, and to the poorer nations whose institutions are subject to a process of corrosion through harm and violence committed by the elite corporate bodies.

By adopting a holistic approach and by co-opting all the principal actors into the process of reform, a country or community can enhance its
capacity to curtail crime and violence of corporate bodies to manageable levels. But none of this can be tackled without enlightened and determined political leadership, without high levels of public awareness and support, and without a motivated and well-led corporate sector. In many countries, the most difficult element in the equation is that of developing a vibrant civil society willing and able to play a meaningful role in shaping its viable corporate environment.

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